SUPREME COURT, U. S.
73-548
Supreme Court, U. S.
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IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1973

No. 00-000

EARL W. HAHN and MARY HAHN,

Petitioners,

v.

ROBINSON MEMORIAL HOSPITAL,

Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE SUPREME COURT OF OHIO

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PETITION FOR WRIT OF CERTIORARI TO THE SUPREME COURT OF OHIO

Petitioners pray that a writ of certiorari issue to review the judgement of the Supreme Court of Ohio in the case of Earl W. Hahn, et al. v. Robinson Memorial Hospital, entered June 27, 1973, rehearing denied September 6, 1973. That judgment dismissed an appeal from the judgment of the Court of Appeals of Ohio, Eleventh Appellate District, entered October 21, 1972, affirming a judgment against Petitioners.

OPINIONS BELOW

The opinion of the Court of Appeals of Ohio, Eleventh Judicial District, has not been reported. It is printed as the Announcement of Decision, Appendix A hereto. The

Supreme Court of Ohio dismissed Petitioners' appeal and motion for rehearing without opinions, which orders are attached as Appendix B and Appendix C hereto.

JURISDICTION

The jurisdiction of this Court is invoked under 28 U.S.C. §1257 (3), the petitioners having asserted below and are asserting here the deprivation of rights secured to them by the due process and equal protection clauses of the Fourteenth Amendment to the Constitution of the United States. The judgment of the Court of Appeals of Ohio, Appendix D hereto, was entered on October 21, 1972. The judgment of the Supreme Court of Ohio, dismissing Petitioners' appeal, Appendix B hereto, was entered on June 26, 1973. The judgment denying Petitioners a rehearing, Appendix C hereto, was entered on September 6, 1973.

QUESTION PRESENTED

Whether the application of the doctrine of governmental immunity to a county hospital acting in a proprietary manner deprived a paying patient at that hospital, injured by the negligence of its employees and agents, of due process and equal protection of the law.

CONSTITUTIONAL PROVISIONS INVOLVED

This case involves Section 1 of Amendment XIV to the Constitution of the United States which provides:

> All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of

> citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

This case also involves Article I, Section 16 of the Constitution of the State of Ohio which provides:

> All courts shall be open, and every person, for an injury done him in his land, goods, person, or reputation, shall have remedy by due course of law, and shall have justice administered without denial or delay. Suits may be brought against the state, in such courts and in such manner, as may be provided by law.

STATEMENT OF THE CASE

Petitioner Earl W. Hahn sustained injuries to his then only remaining arm as a result of its being crushed in a conveyor. On that day he was taken as a paying patient to Respondent Robinson Memorial Hospital, a county hospital which receives almost 96% of its income from paying patients, where his injuries were diagnosed and treated by agents and employees of Respondent. Because these agents and employees negligently failed to diagnose and treat the circulatory problems of Petitioner Earl W. Hahn, his arm became gangrenous and consequently had to be amputated, leaving him armless.

Petitioner Earl W. Hahn brought suit against Respondent for damages based on the negligent conduct of its agents and employees. Petitioner Mary Hahn, wife of Petitioner Earl W. Hahn, joined in that action, seeking damages for loss of consortium. Respondent was granted its motion for summary judgment on the ground that, as a county hospital, it is immune from tort liability for the

negligence of its agents and employees under the doctrine of governmental immunity.

Petitioners then appealed to the Court of Appeals of Ohio, citing as their second assignment of error:

> The denial of Appellants of their remedy against Appellee on the basis of sovereign immunity was a violation of the equal protection and due process clauses of the Fourteenth Amendment of the Constitution of the United States. (See p. 3a of Appendix A)

The Court of Appeals held that a county was a political subdivision of the state and may only be sued by statutory authority (See p. 2a of Appendix A) on the basis of the third syllabus of *Krause v. State of Ohio*, 31 Ohio St.2d 132 (1972), which states:

> Section 16 of Article I of the Ohio Constitution, as amended September 3, 1912, which provides that "***Suits may be brought against the state in such courts and such manner, as may be provided by law," is not self-executing, and statutory consent is a pre-requisite to such suit.

As to Petitioners' equal protection argument, the Court of Appeals quoted the fourth syllabus of *Krause, supra*, which states:

> Section 16 of Article I of the Ohio Constitution does not offend the Equal Protection Clause of the Fourteenth Amendment to the United States Constitution. (See 3a of Appendix A)

With respect to Petitioners' due process argument, the Court of Appeals held:

> As to Appellant's contention that his rights to due process have been violated, this court if (sic) of the opinion that his right of due process has not been

violated, since Article I, Section 16 of the Ohio Constitution is a part of the organic law of Ohio. The people of Ohio, in 1912, placed the policy decision of tort liability for the State of Ohio in the sole hands of the General Assembly and it has not seen fit to create such liability.

From that decision Petitioners filed a Notice of Appeal in the Supreme Court of Ohio, stating:

> This case involves a substantial constitutional question under the Due Process and Equal Protection Clauses of Amendment XIV, Section 1, of the Constitution of the United States. (See Appendix D)

On June 27, 1973, the Supreme Court of Ohio dismissed Petitioners' appeal for the reason that no substantial constitutional questions existed therein. (See Appendix B). Petitioners then filed a motion for rehearing, which rehearing was denied on September 6, 1973. (See Appendix C)

REASONS FOR GRANTING THE WRIT

I.

APPLICATION OF THE DOCTRINE OF GOVERNMENTAL IMMUNITY TO A COUNTY HOSPITAL ACTING IN A PROPRIETARY CAPACITY, THEREBY DENYING A PAYING PATIENT IN THAT HOSPITAL HIS REMEDY FOR THE NEGLIGENT CONDUCT OF THE HOSPITAL'S EMPLOYEES AND AGENTS, IS A DENIAL OF EQUAL PROTECTION OF THE LAW.

The Supreme Court of Ohio has determined that Article 1, Section 16 of the Ohio Constitution, which provides in part,

> Suits may be brought against the state in such courts and in such manner, as may be provided by law,

is not self-executing, and that the State of Ohio is not subject to suits in tort in the courts of this state without the consent of the general assembly. *Raudabaugh v. State*, 96 Ohio St. 513 (1917); *Krause v. State*, 31 Ohio St. 2d 132 (1972). That court has also held, as did the Court of Appeals below, that a county or its agencies are immune from suit for negligence in the absence of statutory authorization therefor. *Schaffer v. Board of Trustees*, 171 Ohio St. 228 (1960). There has been no such statutory authorization.

However, the Ohio Supreme Court has also held that there is no statute in Ohio imposing a duty upon municipalities to own or operate a hospital, that maintenance of a hospital is not essential to the government of a municipality, that maintenance of a hospital by a municipality is a proprietary and not a governmental function, and that the defense of governmental immunity is not available to the municipality which owns the hospital. *Sears v. City of Cincinnati*, 31 Ohio St.2d 157 (1972).

By the same token, there is no statute in Ohio imposing a duty upon a county to own or operate a hospital, nor is maintenance of a hospital essential to the government of a county. Therefore, operation of a county hospital as a matter of law is also a proprietary function.

Further, Petitioner Earl W. Hahn was a paying patient in Respondent hospital, which receives almost 96% of its income from paying patients. Thus, Respondent was clearly acting in a proprietary capacity just like any private hospital.

When Petitioner Earl W. Hahn was injured by the negligent conduct of Respondent, there accrued to him a vested right in his cause of action. The right of access to

the courts is a right so basic to the concept of ordered liberty that such right is one to be denominated as being fundamental. *Cincinnati Gazette Co. v. Timberlake*, 10 Ohio St. 549 (1860); *Baltimore & Ohio R. Co. v. Stankard*, 56 Ohio St. 224 (1897); *Diamond v. Davis Bakery, Inc.*, 8 Ohio St.2d 38 (1966). The state may discriminate where fundamental rights are involved only with the showing of a compelling state interest. *Shapiro v. Thompson*, 394 U.S. 618 (1969). In this case there is no compelling state interest to justify denying Petitioners their remedy, and doing so would constutite invidious discrimination.

The doctrine of governmental immunity, as applied in Ohio, creates a classification of those tort victims who are injured by the negligent conduct of a municipal hospital or private hospital, who may recover for their injuries, and those victims injured by the identical conduct of a county hospital acting in the very same non-governmental manner, but who are denied their remedy.

Assuming arguendo that there is some rational basis for the doctrine of governmental immunity when the county is acting in a governmental capacity, there certainly is no basis for it when a county leaves the sphere of governmental activity and undertakes to act in a proprietary manner in competition with other private concerns. When a county undertakes to act in a proprietary manner, it thereby assumes the duties, obligations, and liabilities concomitant with that activity. It should bear the cost of insuring itself against tort liability, just as any other hospital must as a cost of doing business, or assume the duty of answering for judgments against it. If the county is not in a position to answer for its wrongdoings committed while performing a proprietary function, that function should not be undertaken by it.

Moveover, as a matter of policy, with the trend toward more and more county government involvement in traditionally private functions, the county should be answerable for its torts committed as a result of such activity. The greater the involvement in proprietary functions, the greater the number of tort victims left remediless by blanket application of the doctrine of governmental immunity. A monopoly of traditionally proprietary functions by the county would be the virtual abolishment of common law tort liability.

In this case, however, the action was not brought against the county or its general fund, but only against Respondent Robinson Memorial Hospital. Judgment against Respondent would not subject the county or its assets to execution. There is no issue in this case of hardship to the county itself resulting from a judgment against Respondent.

Article I, Section 16 of the Ohio Constitution, as construed by the Ohio Supreme Court, creates a classification of those tort victims who are injured through a proprietary activity of a county hospital, and a classification of those victims of the very same activity performed by a private or municipal hospital, denying recovery to the former class. Such classification is arbitrary and capricious, has no rational basis, and the state can show no compelling interest for such a rule of law that denies the individual his remedy for any claimed public policy advanced by blanket immunity.

Assuming arguendo that the state has a legitimate interest in providing immunity to the county while undertaking activities which are essential to its functioning and inherent in its very purpose for existing, Article I, Section 16 of the Ohio Constitution, as construed by the Ohio Supreme Court, further invidiously discriminates in that it is over-inclusive by

virtue of providing all activities of the county, both proprietary and governmental, with governmental immunity. If immunity is justifiable for those activities inherent in the process of government, that fact does not thereby justify immunity when the county assumes functions not required to be performed by it. There is no duty for a county to operate a hospital. However, if it undertakes to do so, it should bear the responsibilities of such operation, just as the individual who has no duty to act, but does so as a mere volunteer, must assume the consequences of that act. Blanket governmental immunity as a means to achieve a legitimate state objective, i.e., the right and duty of the state to protect itself, is unconstitutionally overbroad, when given the close scrutiny due the denial of a fundamental right. To deny Petitioners their remedy would be to deprive them of equal protection of the law.

II.

APPLICATION OF THE DOCTRINE OF GOVERNMENTAL IMMUNITY TO A COUNTY HOSPITAL ACTING IN A PROPRIETARY CAPACITY, THEREBY DENYING A PAYING PATIENT IN THAT HOSPITAL HIS REMEDY FOR THE NEGLIGENT CONDUCT OF THE HOSPITAL'S EMPLOYEES AND AGENTS, IS A DEPRIVATION OF DUE PROCESS OF THE LAW.

The guarantee of due process demands that the law shall not be unreasonable, arbitrary or capricious, and that the means selected have a real and substantial relation to the object sought to be attained. *Nebbia v. New York*, 291 U.S. 502 (1934). Likewise, due process demands that a law be reasonable in relation to its subject and be adopted in the interests of the community. *West Coast Hotel Co. v. Parrish*, 300 U.S. 379 (1937).

In the instant case the subject involved is Petitioners' property right in their cause of action, combined with their right to seek redress in the courts, a basic and fundamental right. A state may regulate the procedure of its courts in accordance with its own conception of policy, but the state may not act unreasonably or arbitrarily. Moreover, if the state is to totally deny a person his remedy, it may do so only for the most compelling reasons. The State of Ohio has no rational basis for denying Petitioners their remedy where their right of action has accrued because of the negligent operation of a county hospital, a proprietary activity. To do so would violate all notions of fundamental fairness.

Presumably, the objective sought through the doctrine of governmental immunity is to prevent curtailment of governmental functions and insolvency as a result of crippling judgments. However, here we are not dealing with a governmental function. Likewise, the spectre of crippling judgments has not materialized in those states even totally abolishing their immunity. Notwithstanding that danger, the county hospital may always protect itself through insurance, a usual incident of doing business. Furthermore, this action is one against Respondent hospital and not the county itself or its general fund.

As stated in *West Coast Hotel Co., supra,* due process requires that a law for the welfare of the people must be "adopted in the interest of the community." It is not in the interest of the community to allow the county to act with impunity and withhold remedies from the members of that community where there is no compelling reason, or even a rational basis. To do so is a denial of due process of law.

CONCLUSION

For the above reasons a Writ of Certiorari should issue to review the judgment of the Court of Appeals of Ohio and the judgments of the Supreme Court of Ohio denying review.

Respectfully submitted,

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APPENDIX A

COURT OF APPEALS OF OHIO, ELEVENTH DISTRICT
COUNTY OF PORTAGE
COURT OF APPEALS CASE NO. 483

EARL W. HAHN and
MARY HAHN

Appellants

- vs -

ROBINSON MEMORIAL HOSPITAL

Appellee

ANNOUNCEMENT OF DECISION

DATED: October 10, 1972.

This cause came on to be heard upon the record in the Trial Court, and was briefed and argued by counsel for the parties. Upon consideration whereof, this Court finds no error prejudicial to the appellant and, therefore, the judgment of the Trial Court is affirmed. Each assignment of error was reviewed and upon review the following disposition was made:

Assignment of error #1:

The Portage County Common Pleas Court erred in granting judgment for Appellee, Robinson Memorial Hospital on its motion for summary judgment in that the Court found that Appellee, as an agency of the County of Portage, was immune from suit.

This assignment of error is without merit.

In Krause v. State of Ohio, 31 Ohio St. 2d, 132, the Supreme Court of Ohio held:

"2. Section 16 of Article I of the Ohio Constitution, as amended September 3, 1912, abolished the defense of governmental immunity and empowered the General Assembly to decide in what courts and in what manner suits may be brought against the state."

The county, being a political subdivision of the state, may also be sued only by statutory authority (Hunter v. Mercer County, 10 OS 515).

It is true that the Supreme Court of Ohio in Sears v. City of Cincinnati, 31 OS 2d 157, ruled:

> "1. Maintenance of a municipal hospital by a municipal corporation is not essential to the government of a municipality and is not an exercise of an inherently governmental faction.
>
> 2. In an action for damages alleged to be caused by the negligence of an employee of a municipal hospital, the defense of governmental immunity is not available to the municipality which owns the hospital."

Appellant urges that a county hospital stands in the same position as a municipal hospital and therefore should be immune from suit under the rationale of the Sears case. However, appellant fails to recognize that a county is a subdivision of the state while a municipal corporation, on the other hand, is a corporation invested with certain powers of a private or proprietary nature. Accordingly, the Sears case is no authority for the proposition that county hospitals are not immune from suit.

Pursuant to Section 16 of Article I of the Ohio Constitution, the defense of governmental immunity may be abrogated as to both the state and its political subdivisions, such as counties, by the General Assembly of Ohio deciding in what courts and in what manner suits may be brought against the state or its political subdivisions.

In the opinion of this court, Sections 2305.01, 2307.01, 339.06 and 339.16 of the Revised Code of Ohio constitute no "decision" by the General Assembly as to

"what courts and in what manner suits may be brought against the state" as far as tort liability of county hospitals is concerned.

Therefore, a county hospital continues to be immune from suit for tort liability, under the present state of law in Ohio.

Assignment of error #2:

The denial to Appellants of their remedy against Appellee on the basis of sovereign immunity was a violation of the equal protection and due process clauses of the Fourteenth Amendment of the Constitution of the United States.

This assignment of error is without merit.

Appellant's contention that his rights of equal protection of the laws has been violated is also answered by the Ohio Supreme Court in the Krause case, supra, in which it held:

"4. Section 16 of Article I of the Ohio Constitution does not offend the Equal Protection Clause of the Fourteenth Amendment to the United States Constitution."

As to the appellant's contention that his rights to due process have been violated, this court if of the opinion that his right of due process has not been violated, since Article I, Section 16 of the Ohio Constitution is a part of the organic law of Ohio. The people of Ohio, in 1912, placed the policy decision of tort liability for the State of Ohio in the sole hands of the General Assembly and it has not seen fit to create such liability.

Thus there was no genuine issue as to a material fact in this case.

Judgment affirmed.

/s/ Robert E. Cook
JUDGE
ROBERT E. COOK

Jones, J.
Hofstetter, J., concur.

NOTE: If a Motion for Reconsideration (Rule 26) is not filed with this Court within ten days from the filing date hereof, or a Journal Entry is not presented to this Court within the same ten days from the filing date hereof for signature, this Court will journalize this decision sua sponte (Rule 22D) and the time period for review will begin to run therefrom.

APPENDIX B

THE SUPREME COURT OF THE STATE OF OHIO

THE STATE OF OHIO, — *1973 TERM*

City of Columbus. — *To wit:* June 27, 1973

Earl W. Hahn et al.,
Appellants,

vs.

Robinson Memorial Hospital,
Appellee.

No. 72-883

APPEAL FROM THE COURT OF APPEALS
for PORTAGE *County*

This cause, here on appeal as of right from the Court of Appeals for PORTAGE *County, was heard in the manner prescribed by law, and, no motion to dismiss such appeal having been filed, the Court sua sponte dismisses the appeal for the reason that no substantial constitutional question exists herein.*

It is further ordered that a copy of this entry be certified to the Clerk of the Court of Appeals for PORTAGE *County for entry.*

I, Thomas L. Startzman, Clerk of the Supreme Court of Ohio, certify that the foregoing entry was correctly copied from the Journal of this Court.

Witness my hand and the seal of the Court
this . . . . . day of . . . . . 19 . . . .
. . . . . *Clerk*
. . . . . *Deputy*

APPENDIX C

[Caption Omitted in Printing]

To wit: September 6, 1973

REHEARING

It is ordered by the court that rehearing in this case is denied.

I, THOMAS L. STARTZMAN, Clerk of the Supreme Court of the State of Ohio, do hereby certify that the foregoing entry was correctly copied from the records of said Court, to wit, from Journal No. . . . . Page . . . .

IN WITNESS WHEREOF, I have hereunto subscribed my name and affixed the seal of the Supreme Court this 6th *day of* September, *1973*

THOMAS L. STARTZMAN *Clerk.*

By . . . . . Deputy.

APPENDIX D

COURT OF APPEALS OF OHIO, ELEVENTH DISTRICT
COUNTY OF PORTAGE
COURT OF APPEALS CASE NO. 483

EARL W. HAHN and
MARY HAHN

APPELLANTS

vs **JOURNAL ENTRY**

ROBINSON MEMORIAL HOSPITAL

APPELLEE

* * *

For the reasons stated in the decision rendered herein on the 10th day of October, 1972, the assignments of error are overruled and it is the judgment and order of this Court that the judgment of the Common Pleas Court of Portage County, Ohio, is affirmed.

ROBERT E. COOK
Presiding Judge

GEORGE M. JONES
Judge

EDWIN T. HOFSTETTER
Judge